

United States District Court  
For the Northern District of California

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6 ADVANCED ROTORCRAFT  
7 TECHNOLOGY, INC.,

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10 No. C 06-06470 WHA

11 Plaintiff,

12 v.

13 L-3 COMMUNICATIONS CORPORATION,

14 Defendant.

15 \_\_\_\_\_ /  
16  
17 **ORDER DENYING PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION, AND VACATING  
HEARING**

18 **INTRODUCTION**

19 In this copyright-infringement action between defense contractors, plaintiff moves for a  
20 preliminary injunction to halt defendant's use of its software allegedly in violation of a license  
21 agreement. Plaintiff has not shown a reasonable likelihood of success on the merits or that the  
22 balance of hardships tips sharply in plaintiff's favor. Accordingly, plaintiff's motion for  
23 preliminary injunction is **DENIED**. Seeing that no further argument is necessary on this motion,  
24 the hearing is hereby **VACATED**.

25 **STATEMENT**

26 Plaintiff Advanced Rotorcraft Technology, Inc. designs, develops, and markets  
27 simulator productivity tools and reconfigurable flight simulators for both fixed-wing aircraft  
28 and helicopters. Its products are used for engineering and pilot training (DuVal Decl. ¶ 2). The  
products primarily consist of software used by the United States Army, Navy, and Air Force, in

1 addition to commercial defense companies, aircraft manufacturers, and flight simulator  
2 companies (*ibid.*). Defendant L-3 Communications Corporation also designs and supplies flight  
3 simulators for training pilots on fixed-wing aircraft and military helicopters (Genna Decl. ¶ 2).  
4 This includes supplying simulators to the United States Army for training pilots for several  
5 types of military helicopters currently in service (*id.* at ¶ 3).

6 One of defendant's principal simulator products was the Aviation Combined Arms  
7 Tactical Training simulator ("AVCATT") (*id.* at ¶ 5). The AVCATT simulator provided  
8 "combined" training which allowed several pilots to train simultaneously as a team in a  
9 networked environment (*ibid.*). The simulators could be altered quickly to simulate different  
10 aircraft, flight conditions, and types of missions (*id.* at ¶ 6). The AVCATT simulator used  
11 software known as a flight dynamics model (*id.* at ¶ 15). ART supplied a flight dynamics  
12 model to L-3 from its FlightLab family of products called the Stand Alone Run Time Library  
13 software for use in the AVCATT simulator (DuVal Decl. ¶ 4).

14 Software Licenses Between ART and L-3

15 In 2000, the United States Army began soliciting bids for the AVCATT-A program,  
16 Government Contract Number N61339-00-C-D002 (*id.* at ¶ 12). The contract was awarded to  
17 L-3. Initially, it was to supply three or four simulator suites, each containing six flight  
18 simulators, and ultimately up to 30 to 40 simulator suites (*id.* at ¶¶ 13–14). L-3 entered into a  
19 license agreement with ART under which ART would supply its FlightLab software for use in  
20 the simulators (*id.* at ¶ 15, Cox Decl. ¶ 3). The original agreement permitted the software to be  
21 installed on six computers for a total price of \$54,000, or \$9,000 per computer (*id.* at ¶ 15).

22 As the AVCATT-A program expanded, L-3 determined that it would be easier and more  
23 efficient to stop licensing the FlightLab software on a per-computer basis (Cox Decl. ¶ 4). In  
24 the spring of 2002, parties entered into the project buyout license agreement. L-3 contends that  
25 the project buyout license was for unlimited use of the FlightLab software in any AVCATT  
26 simulator, while ART contends that the project buyout license allowed unlimited use of the  
27 FlightLab software for only the AVCATT-A Project. The license fee was \$200,000 (*id.* at Exh.  
28 3).

1           The license itself allowed the software to be run on an unlimited number of CPUs  
2 (computers), in any number of places (*ibid.*). The license was for a “Specified Project,” the  
3 “Aviation Combined Arms Tactical Training Simulators” (*ibid.*). The terms and conditions  
4 defined “Specified Project” as “the specific project for which a Project Buyout License has been  
5 obtained” (*id.* at ¶ 1.6). Section 2.3 of the project buyout license also stated (*id.* at ¶ 2.3):

6           For a Project Buyout License, the Licensed Program(s) can be used on an  
7 unlimited number of computer systems *as long as the utilization is for the*  
*Specified Project.* The Licensee is responsible to insure that no computers  
8 operating the Licensed Software under a Project Buyout License are using the  
Licensed Software in support of any application other than the Specified Project.

9           Under the license, L-3 was also granted the right to modify, improve, or enhance the licensed  
10 program to form derivative or updated works, as long as the software provided by ART was  
11 removed from the derivative work when the license was terminated (*id.* at ¶ 6.3). The license  
12 could be terminated for failure to perform with 60 days written notice (*id.* at ¶ 13.0). The final  
13 paragraph of the license stated “[t]his License states the parties’ entire agreement with respect  
14 to its subject matter. It supersedes, merges, and renders void any and all other agreements or  
15 understandings (oral or written) pertaining to such subject matter” (*id.* at ¶ 17.6).

16           ART contends that the project buyout license agreement also consisted of the purchase  
17 order, L-3’s general terms and conditions, supplement 1 to the L-3 general terms and conditions  
18 entitled “Government Contract Provisions from the Federal Acquisition Regulation (FAR),” and  
19 supplement 2 to the L-3 general terms and conditions entitled “Government Contract Provisions  
20 from the Department of Defense Federal Acquisition Regulation (DFAR)” (DuVal Decl. ¶ 18).  
21 Specifically, ART argues that the purchase order was part of the agreement, while L-3 argues  
22 that the purchase order was merely used to pay for the license pursuant to government  
23 regulations. A typed provision in the purchase order stated “[t]his Purchase Order issued to  
24 obtain one Advanced Rotorcraft License Buy Out in support of the AVCATT-A Program,  
25 Contract Number N61339-00-C-0001” (DuVal Decl. Exh. C1). The purchase order  
incorporated the terms of the Buyout License Agreement. L-3 asserts that its standard terms  
and conditions were attached to the purchase order, not to the project buyout license. David  
Cox, L-3’s representative in the negotiations, declares that he did not suggest to ART that the

1 scope of the project buyout license was restricted to the AVCATT-A Program (Cox Decl. ¶ 6).  
2 ART's president, Ronald DuVal, declares that ART never would have granted a license  
3 allowing its software to be used for any project for the sum of \$200,000 (DuVal Decl. ¶ 20).

4 Flight School XXI

5 Around 2002, L-3 started working with Computer Science Corporation on a subcontract  
6 bid to furnish flight training equipment to the United States Army for its Flight School XXI  
7 program (Genna Decl. ¶ 8). The bid was accepted in 2003 (*ibid.*). Flight School XXI planned  
8 to use two types of simulators, Operational Flight Trainers and Reconfigurable Collective  
9 Training Devices (RCTDs) (*id.* at ¶¶ 8, 12). The Army and L-3 planned to install AVCATT  
10 simulators to meet the requirements of the RCTDs (*id.* at ¶ 8). L-3 contracted to supply,  
11 support, and maintain three AVCATT simulator suites for the Flight School XXI program (*id.*  
12 at ¶ 9).

13 ART had submitted a subcontract bid to supply flight dynamics software for the RCTDs,  
14 but L-3 ultimately went with a different subcontractor. ART now declares that the RCTD  
15 software for which it submitted a bid was the same technology used in the AVCATT-A  
16 program (DuVal Decl. ¶ 32). ART's bid consisted of software very similar to what they  
17 provided for the AVCATT-A Program (*id.* at ¶ 33). L-3 never responded to ART's bid (*id.* at ¶  
18 34). L-3 disagrees and points out that the RCTDs had much higher resolution displays and  
19 could not train pilots in a team environment. ART asserts that the scope of the Project Buyout  
20 License came up during those discussions, but the issue was not resolved (Cox Decl. ¶ 7).  
21 ART's representative in the negotiations, David Cox, stated that it did not believe it was  
22 required to pay additional license fees for use of the software outside of the AVCATT-A  
23 Program so long as the software was used on AVCATT simulators.

24 Issues of the Scope of the Buyout License

25 In September 2004, Richard Krance took over responsibility for subcontracting licenses  
26 from David Cox (Krance Decl. ¶ 2). Krance contacted DuVal asking for his position on the  
27 scope of the project buyout license (*id.* at ¶ 6). DuVal responded (*id.* at Exh. 2):

28 L3 purchased a run-time license buyout for the AVCATT program for \$200,000  
that allows you to use the FLIGHTLAB component library on an unlimited

1           number of target computers purchased by the U.S. Government under the  
2           AVCATT program . . . Even though AVCATT simulators will be used in Flight  
3           School XXI, it is a different program from AVCATT and the AVCATT buyout  
4           license does not apply to simulators used in the Flight School XXI program.

5  
6           DuVal also stated that effective October 1, 2004, ART would no longer license the FlightLab  
7           software on a per computer basis, but it would license the software on a per helicopter model  
8           basis (*ibid.*). The offer was for the same software that was covered under the project buyout  
9           license agreement.  
10

11           L-3 was under a deadline for the Flight School XXI project, so before receiving a  
12           response from DuVal, Krance contacted Hossein Saberi, another ART employee. Krance asked  
13           if ART could extend the license until the end of the year on FlightLab "as is" with no  
14           modifications or extra software, and asked if they intended to charge, and if so, at what price  
15           (Krance Decl. Exh. D). Saberi quoted a price of \$225,000. L-3 did not respond further to that  
16           email. L-3 responded with a letter dated September 24, 2004, stating that it believed it could  
17           use the FlightLab software under the project buyout license agreement on additional AVCATT  
18           simulators (DuVal Decl. Exh. F). DuVal called Krance several times and informed him that he  
19           was incorrect, and that if L-3 persisted, ART would terminate the license and seek legal  
20           recourse (*id.* at ¶¶ 29–30).

21           *Termination of the Project Buyout License Agreement*

22           Early in 2006, Mike Seaman of L-3 contacted ART to discuss L-3's use of the FlightLab  
23           software in the Flight School XXI project (DuVal Decl. ¶ 35). ART and L-3 met face-to-face to  
24           discuss the use of the software, but Don Collings, the person with whom ART wanted to discuss  
25           the licenses, was not present (*id.* at ¶ 36). Shortly thereafter, DuVal and ART discovered that  
26           L-3 intended to use the FlightLab software in its other products, including the HELLCATT  
27           simulator (*id.* at ¶ 37). L-3 stated that the HELLCATT was advertised on its website at the  
28           relevant time, but that it was only a concept program to be marketed in foreign countries (Genna  
Decl. ¶ 21). It denied that it intended to use the FlightLab software in that project. Plaintiff  
emailed defendant informing that its use of the software in the HELLCATT simulator was in  
breach of the licensing agreement on August 17, 2006 (*id.* at Exh. J). On August 31, 2006,  
defendant responded, maintaining that it believed that it was authorized to use the software in

1 connection with the AVCATT simulators for the Army Flight School XXI project (*id.* at Exh.  
2 K).

3 On October 16, 2006, ART announced in a letter to L-3 its intent to terminate the project  
4 buyout license agreement (*id.* at Exh. L). The letter appeared to terminate the license entirely  
5 for both the original AVCATT-A Program simulators and for any additional uses of the  
6 software. It also asked for an auditing of any activity associated with the software. DuVal  
7 declares that ART is now competing with L-3 because it has developed its own flight dynamics  
8 software (*id.* at ¶ 41). L-3 denies this, and declares that even if they are competing, ART does  
9 not compete with its AVCATT simulators (Genna Decl. ¶ 22). L-3 has stated that there is no  
10 immediately available alternative to the FlightLab software, and that terminating its use of the  
11 software would expose it to claims for breach of its obligations to the United States Army and  
12 other contractors. Specifically, it is required to provide an additional eight AVCATT simulator  
13 suites and provide service to the simulators already owned by the Army (Genna Decl. ¶ 20).

14 Procedural History

15 ART filed this action on October 16, 2006, the same day it informed L-3 of its intent to  
16 terminate the project buyout license. The complaint alleges copyright infringement, unfair  
17 competition under California Business & Professions Code Section 17200 *et seq*, breach of  
18 contract, and asserts a demand for declaratory judgment. On December 21, 2006, ART filed a  
19 motion for preliminary injunction originally noticed for a hearing on January 25, 2007. On  
20 January 18, 2007, defendant filed an amended answer and counterclaim alleging that plaintiff's  
21 terminating the project buyout license constituted breach of contract. Now, plaintiff requests an  
22 order enjoining defendant from using, marketing, offering, selling, reproducing, licensing,  
23 developing, distributing, supporting, or maintaining the FlightLab software pursuant to 17  
24 U.S.C. 502 and California Business & Professions Code Section 17203.

25 On January 25, 2007, ART filed objections to the declarations of Leonard Genna and  
26 David Cox filed in conjunction with L-3's opposition brief. In particular, the objections  
27 attacked portions of Genna's declaration in which he argued that granting the injunction would  
28 adversely affect the United States Army's combat readiness and ability to train helicopter pilots.

1 In response, L-3 sought leave to file a sur-reply memorandum addressing the question of the  
2 injunction's affect on the Army's ability to train helicopter pilots. It presented the declaration  
3 of Major Phillip E. Smallwood, project director of the Army Aviation Combined Arms Trainer,  
4 as well as an additional declaration from Genna. Leave to file the sur-reply was granted on  
5 February 5, 2007.

6 On the same day, defendant filed for leave to file a motion to strike evidence presented  
7 in support of plaintiff's reply brief, or in the alternative, leave to file yet another sur-reply  
8 memorandum and declaration. As an initial matter, defendant need not seek leave to file  
9 objections to evidence. On the merits, defendant's motion attacks the reply declaration of  
10 Ronald DuVal for introducing evidence for the first time in connection with a reply brief.  
11 Though that practice is disfavored, plaintiff had already raised arguments relating to L-3's  
12 HELLCATT simulators in its opening brief. Defendant had already denied the truth of those  
13 arguments in its opposition. Plaintiff's reply brief and declarations merely added additional  
14 facts to the same argument. Defendant's motion to strike is **DENIED**. At any event, considering  
15 the evidence that plaintiff presented in the reply declaration does not change the outcome of this  
16 motion.

## 17 ANALYSIS

18 To prevail on a motion for a preliminary injunction in the Ninth Circuit:

19 The moving party must show either (1) a combination of probable success on the  
20 merits and the possibility of irreparable injury, or (2) that serious questions are  
raised and the balance of hardships tips sharply in favor of the moving party.

21 *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 839–40 (9th Cir.  
22 2001) (citation omitted); *see also Arcamuzi v. Cont'l Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir.  
23 1987). “These standards ‘are not separate tests but the outer reaches of a single continuum.’”  
24 *Stuhlbarg*, 240 F.3d at 840 (internal citation omitted).

### 25 1. PROBABLE SUCCESS ON THE MERITS.

26 “[T]he test for a preliminary injunction is ‘probable success on the merits’ or ‘fair  
27 chance of success on the merits.’” *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427,  
28 1430 (9th Cir. 1995) (internal citations omitted); *see also Republic of the Philippines v. Marcos*,

1 862 F.2d 1355, 1362 (9th Cir. 1988) (finding that probable success equates to a showing of “a  
2 fair chance of success”). ART argues that it is entitled to a preliminary injunction on either its  
3 copyright-infringement claim or its California unfair competition claim.

4 **A. Copyright Infringement.**

5 To establish a claim for copyright infringement, plaintiff must prove ownership of the  
6 copyright in question, and that defendant violated one of the exclusive rights granted to the  
7 copyright’s holder. 17 U.S.C. 501(b). A valid certificate of registration is *prima facie* evidence  
8 of the copyright’s validity and ownership. 17 U.S.C. 401(c). ART has presented a valid  
9 certificate of registration listing it as the registrant, author, and owner of the FlightLab software.  
10 Accordingly, ART has established the first prong of its copyright claim.

11 Exploitation of copyrighted material outside the scope of the a license constitutes  
12 copyright infringement. Federal copyright law governs the interpretation of the scope of  
13 licenses of copyrighted materials. “Copyright licenses are assumed to prohibit any use not  
14 authorized.” *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087–88 (9th Cir. 1989). The crux of  
15 the dispute here is whether the project buyout license restricted the use of the FlightLab  
16 software to only the AVCATT-A Program, as ART contends, or to any AVCATT simulator, as  
17 L-3 contends.

18 The project buyout license agreement itself stated that the type of license granted was a  
19 “project buyout license,” defined as “a license to run the Licensed Program(s) on an unlimited  
20 number of computer systems for use only on a Specified Project” (DuVal Decl. Exh. C5). The  
21 “Specified Project” was defined as “the specific project for which a Project Buyout License has  
22 been obtained.” The “Specified Project” stated was the “Aviation Combined Arms Tactical  
23 Training Simulators.” On the license’s face, therefore, it appears that it applied to AVCATT  
24 simulators in general, not specifically to the AVCATT-A Program.

25 Plaintiff argues that L-3’s purchase order indicated otherwise. The purchase order  
26 stated that it was in support of the government contract for the AVCATT-A Program and  
27 incorporated the provisions of the license. It also stated “[t]he price of the license buy out was  
28 quoted during the ART proposal for the AVCATT-A Program. The price of the license buy out

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1 is spread across 3 line items to ammortize [sic] the costs internally . . . ” (*id.* at Exh. C1).  
2 Plaintiff argues that this indicated that the project buyout license was granted only for the  
3 AVCATT-A Program. Defendant contends that it drew up the purchase order for accounting  
4 purposes to get the government to cut a check to ART. The nature of the purchase order itself  
5 and its references to amortization of the cost support this view.

6 Under the parol evidence rule, terms in a writing “may be explained or supplemented  
7 by the evidence of consistent additional terms unless the writing is intended also as a complete  
8 and exclusive statement of the terms of the agreement.” Cal. Code. Civ. Procedure § 1856(b).  
9 The buyout license agreement contained a merger clause stating that it was the entire agreement  
10 the two parties. L-3’s insistence on including terms and conditions of their own undercuts this  
11 argument. Under plaintiff’s view, however, the additional terms in the purchase order were not  
12 consistent. The two documents used two different terms that seem to refer to different things.  
13 Elsewhere in the purchase order, it incorporated the terms of the project buyout license  
14 agreement. The purchase order did not state consistent terms that support plaintiff’s view of  
15 limiting the license to only the AVCATT-A Project.

16 Plaintiff next argues that “AVCATT” and “AVCATT simulators” are the Army’s terms,  
17 not L-3’s terms. At the time of the buyout license agreement, plaintiff contends, defendant did  
18 not make or market any product called an “AVCATT simulator,” there was only the  
19 “AVCATT-A Project.” ART’s usage of the term in its own license belies its argument. ART  
20 drafted the agreement. Had it wished to do so, it could have stated that the “specified project”  
21 was limited to the “AVCATT-A Project.”

22 Finally, ART argues that L-3’s conduct in trying to procure a license for use of the  
23 FlightLab software in additional AVCATT simulators shows that it knew that it had exceeded  
24 the scope of the license. L-3’s conduct, however, is certainly open to the interpretation that it  
25 was trying to clear up any issues remaining with the license before proceeding with its contract  
26 for the Flight School XXI program. L-3 stated that as the discussions wore on, it was under  
27 time pressure to provide simulators for the contract. Defendant also stated repeatedly that it did  
28

1 not believe it needed to pay additional license fees for the simulators used in the Flight School  
2 XXI project.

3 Accordingly, at this early stage, it appears that the project buyout license allows the use  
4 of the software in AVCATT simulators and is not limited to the AVCATT-A Project. ART has  
5 not shown a reasonable likelihood of success in showing that L-3's use of the FlightLab  
6 software in the Flight School XXI project has exceeded the scope of the license. ART also  
7 accuses L-3 of using the FlightLab software in conjunction with its HELLCATT simulator.  
8 L-3, however, states that the HELLCATT is merely a concept, and not an actual product at the  
9 current time. It denies using ART's software with that product. Such use would clearly exceed  
10 the scope of the project buyout license, but plaintiff's mere speculation of future violations are  
11 not enough to warrant the drastic remedy of a preliminary injunction.

12 **2. Unfair Competition Under California Business and Professions Code  
13 Section 17200.**

14 Section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice."  
15 Plaintiff alleges that defendant knew of its intent to limit the scope of the license but continued  
16 to use the software. This caused a wrongful interference with plaintiff's ability to license its  
17 software to other licensees and wrongfully interfered with plaintiff's ability to sell its services to  
18 other users. In its briefs, L-3 also states that it has suffered injuries including dilution of  
19 goodwill, confusion of potential customers, injury to reputation, and diminution in the value of  
its intellectual property.

20 Defendant does not dispute that it knew that plaintiff intended to limit the scope of the  
21 license, or that it continued to use the software. It is easy to see how it would affect the license  
22 with L-3, but the interference with other licensing opportunities is more problematic.  
23 Additionally, ART's employees merely assert that L-3's use has prevented ART from selling or  
24 licensing the FlightLab software to other companies. Those employees cannot identify any  
25 specific relationships with which L-3 has interfered. It is possible that with discovery, ART  
26 could find such customers and have more support for its claim, but it has not made a sufficient  
27 showing at this time.

1           **2. PRESUMPTION OF IRREPARABLE HARM.**

2           In a copyright-infringement action, “a showing of reasonable likelihood of success on  
3 the merits raises a presumption of irreparable harm.” *Johnson Controls, Inc. v. Phoenix Control*  
4 *Sys. Inc.*, 886 F.2d 1173, 1174 (9th Cir. 1989). The presumption applies only where a disputed  
5 term limits the scope of the license. *Sun Microsystems, Inc. v. Microsoft Corp.*, 118 F.3d 1115,  
6 1122 (9th Cir. 1999). Here, the disputed license term does limit the scope of the license; it  
7 controls where defendant can use the FlightLab software. As mentioned above, however,  
8 plaintiff has failed to show a substantial likelihood of success, so plaintiff is not entitled to a  
9 presumption of irreparable harm. Furthermore, because plaintiff has failed to show substantial  
10 likelihood of success on the merits, it must make a greater showing of irreparable harm in the  
11 balance of hardships.

12           **3. SUBSTANTIAL QUESTIONS AND BALANCE OF HARSHIPS.**

13           Plaintiff may be granted a preliminary injunction where there are substantial questions  
14 on the merits and the balance of hardships tips sharply in favor of the moving party. *Southwest*  
15 *Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc). Even  
16 though plaintiff has not shown a substantial likelihood of success on the merits, it has shown  
17 that there still exist substantial questions going to merits. Very little discovery has been taken  
18 in this case. Plaintiff has raised substantial questions on the merits, particularly regarding  
19 plaintiff’s allegations that L-3 is using the FlightLab software in projects other than the  
20 AVCATT simulators.

21           “Subjective apprehensions and unsupported predictions . . . are not sufficient to satisfy a  
22 plaintiff’s burden of demonstrating an immediate threat of irreparable harm.” *Caribbean*  
23 *Marine Serv. Co. v. Baldridge*, 884 F.2d 668, 675–676 (9th Cir. 1988). Plaintiff argues that  
24 L-3’s continued use of the FlightLab software injures business relationships, interferes with  
25 competition for government contracts, diminishes the value of its intellectual property, and  
26 harms ART’s reputation. DuVal, ART’s president, declares that L-3 is currently competing  
27 with ART’s flight simulators using its own technology in L-3’s HELLCATT simulators. L-3  
28 denies that they are using ART’s software in the HELLCATT simulators, and states that the

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1 HELLCATT simulator is merely a concept at this point, not an actual product. Plaintiff's  
2 allegations about L-3's interference with other defense contracts and goodwill are attenuated as  
3 well. Plaintiff identifies no projects, other than the one at issue here, in which L-3's activities  
4 have harmed them. Plaintiff may sustain hardship because of defendant's continued use of the  
5 FlightLab software, however, plaintiff has not made a strong showing of hardship.

6 "Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency  
7 and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377  
8 (9th Cir. 1985). Defendant argues that plaintiff waited more than two years to seek injunctive  
9 relief, while plaintiff argues that at most, the delay was only eight months in which it was  
10 negotiating with defendant to settle the dispute. Regardless of whose view of the facts wins the  
11 day, parties first discussed the scope of the project buyout license in late 2002 in discussions  
12 regarding Flight School XXI. ART was aware that Flight School XXI intended to use the  
13 AVCATT simulators. ART argues that it did not have actual notice of L-3's use of the  
14 FlightLab software until the spring of 2006 when its representatives spoke to L-3's engineers.  
15 ART goes on to accuse L-3 of ducking its attempts to work out the dispute. This does not,  
16 however, eliminate the fact that parties were having disputes about the scope of the license  
17 going back to at least 2004. Accordingly, this factors disfavors plaintiff.

18 "[E]conomic injury alone does not support a finding of irreparable harm, because such  
19 injury can be remedied by a damages award." *Rent-A-Center, Inc. v. Canyon Television &*  
20 *Appliance*, 944 F.2d 597, 603 (9th Cir. 1987). The magnitude of plaintiff's hardships is  
21 severely undercut by its assertion in its opposition that "presuming defendant were willing to  
22 enter into a new licensing arrangement with plaintiff — defendant could even continue using  
23 plaintiff's FlightLab Run-Time Software for its flight simulators" (Br. at 17). In negotiations,  
24 most of plaintiff's activities were directed at getting a new license with defendant for its use of  
25 the software, not preventing it from competing with ART. Plaintiff also states that its delay in  
26 seeking injunctive relief was so it could seek productive business solutions with defendant. All  
27 of this militates for a finding the plaintiff could be made whole by monetary damages, and will  
28 not suffer hardships so severe that they require injunctive relief.

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1       Defendant argues that it, and the public interest, would suffer harm if this injunction was  
2 granted. The district court may also consider whether the public interest favors plaintiff in  
3 determining the balance of hardships. *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959,  
4 974 (9th Cir. 2002). Defendant contends that because there is no readily available substitute for  
5 the FlightLab software, some of the Army's helicopter training programs would be effectively  
6 shut down if this injunction issues. Plaintiff seeks to enjoin defendant from using, marketing,  
7 offering, selling, reproducing, licensing, developing, distributing, supporting, or maintaining the  
8 FlightLab software. Furthermore, plaintiff has terminated the project buyout license with L-3  
9 because L-3 allegedly breached the agreement. Thus, plaintiff's proposed injunction would  
10 prevent L-3 from using the FlightLab software in both the AVCATT-A Program simulators and  
11 the Flight School XXI simulators.

12      Defendant presents evidence that in addition to exposing it to claims for breach of  
13 contract by its suppliers, such an injunction would undermine the combat readiness of military  
14 helicopter pilots. Under the AVCATT-A Program, L-3 sold the simulators to the Army, and  
15 argues that the Army, as an assignee of the license, would be unable to use the software. This  
16 problem could be circumvented by carefully crafting the injunction. Indeed, ART has stated  
17 that it only wishes to enjoin L-3's activities, not the Army's. More problematic is that L-3  
18 provides support for the AVCATT-A Program simulators (Genna Supp. Decl. ¶ 4). Those  
19 simulators are operated, supported, and serviced by L-3's engineers, not Army personnel (*ibid.*).  
20 As to Flight School XXI, L-3 retains ownership of those simulators, as well as operating,  
21 supporting, and maintaining them.

22      Defendant also presents evidence that the AVCATT simulators are key to the combat  
23 readiness of military helicopter pilots (Smallwood Decl. ¶ 4). There exists no readily available  
24 substitute for the training these simulators provide (*ibid.*). It would take nearly a year to find  
25 and install replacement software for the AVCATT simulators (Genna Supp. Decl. ¶ 4). If the  
26 simulators were inoperable, more training missions would have to be flown using real aircraft at  
27 greatly increased risk and expense.

28

As to the balance of hardships, plaintiff likely has shown that it will suffer some damage to goodwill and its business opportunities if this injunction does not issue. Plaintiff, however, has indicated that it can be made whole through monetary damages which militates against issuing injunctive relief. Defendant has shown that issuing an injunction could shut down military training programs that are considered valuable for national defense. Accordingly, plaintiff has not shown that the balance of hardships tips sharply in its favor. Plaintiff's motion for preliminary injunction is **DENIED**.

## CONCLUSION

9 For all the above-stated reasons, plaintiff's motion for preliminary injunction is **DENIED**.  
10 Seeing that no further argument is necessary on this motion, the hearing is hereby **VACATED**.

## IT IS SO ORDERED.

Dated: February 6, 2007

WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE